diversity, otherwise the FCC would have allocated additional channels to these markets. Consumers living near the center of each market have access to 9 over-the-air signals, which provides sufficient diversity under FCC rules. Because of Grade A overlap, consumers could potentially have access to 18 independently owned stations.

In a worst case scenario all the stations in market A acquire a sister station in market B, reducing the number of independently owned stations in the overlap area from 18 to nine. This is precisely the number of independently owned stations in the center of each market. The *Second Further Notice* does not explain why it is necessary for those consumers living in the overlap area to have access to a greater number of independently owned stations than those consumers living in the center of each individual market. This is especially true given the fact that as a matter of viewing, consumers living in the overlap area are likely to identify with only one market with respect to their predominant viewing patterns.[37]

As a practical matter, consumers living in the overlap area may not necessarily have more access to different types of programming. Because the network affiliate contracts and syndication agreements are based on DMA's, consumers living in these overlap areas may be receiving duplicate programming from much of the broadcast day.

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[37]The only instance where Grade A contours might be relevant is in large DMAs. It is entirely possible for two stations to be located in the same DMA even though their grade A signals are 60 -100 miles apart. In these instances, the stations may be considered to serve two distinct markets. Thus, for such stations, the FCC should, on a case by case basis, find these stations to be in separate markets under the duopoly rule.

Finally, the proposal contained in the *Second Further Notice* is nothing more than a revised regional concentration rule. Essentially the proposed rule will prohibit the common ownership of adjacent market stations all along the east coast from Boston to Washington, DC. It proposes this rule despite the fact that these distinct markets contain a plethora of media outlets. This approach not only defies logic, it is inconsistent with past Commission decisions. While perhaps less restrictive than the existing Grade B overlap standard, it will not permit local stations to harness the efficiencies necessary to compete in a multi-channel world.[38]

IV. Exceptions And Waivers To The Duopoly Rule

The *Second Further Notice* solicits comment on possible exceptions to the duopoly rule. There appear to be two possible alternatives: 1) a specific exception recognized in the duopoly rule itself or 2) a waiver process to treat exceptions on a case by case basis.

A. The Commission Should Create an Exception to the Duopoly Rule That Permits UHF/UHF and UHF/VHF Combinations in Local Markets.

The FCC should make a specific exception for local combinations involving UHF stations. In earlier comments, ALTV specifically documented the inherent disparity between UHF stations and their VHF counterparts. Quite frankly, combinations involving

[38]To the extent the Commission adopts this two part standard, then media voices in both markets should be considered by the FCC in determining the number of independent voices under its proposed waiver standard. Thus, waivers in the Washington television market should include voices that are broadcast from Baltimore.

UHF stations provide no threat to diversity or competition. A general exception for these combinations should be recognized.

The overwhelming majority of commenters in this proceeding support this proposal. As the FCC Office of Plans and Policy found, some UHF stations are most likely to go dark as a result of multi-channel competition.[39] Accordingly, permitting UHF stations to combine with other stations in the marketplace will facilitate competition and diversity by ensuring that they stay on the air.

Our (INTV's) initial comments documented the case for UHF/UHF and UHF/VHF combinations.[40] We included research conducted by the Law and Economics Consulting Group, Inc. demonstrating that despite the increase in cable penetration, UHF stations are in no way equivalent to their VHF counterparts. To the contrary, the expansion of cable is associated with sharp declines in the profitability of UHF affiliates and UHF independent stations.[41] The profitability gap between UHF and VHF stations has grown over time. This position finds significant support in the comments.

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[39]More recently the FCC distinguished the divestiture time granted in the CBS/Westinghouse case from the Channel 64 case on the grounds that the Channel 64 case involved UHF stations and not the more powerful VHF stations to be owned by Westinghouse. *In re Stockholders of CBS Inc*, 11 FCC Rcd 3733, 3764 (1996).

[40]INTV Comments at 24.

[41]Law and Economics Consulting Group. Inc., Economic Report, filed in MM Docket No. 94-123, march 7, 1995 at 34, 36 and 37.

Malrite documented the inherent difference between UHF and VHF stations. [42] A study by the National Economic Research Associates, Inc., (NERA) appended to the Malrite Comments, examined the circulation of UHF and VHF stations in Cleveland. They also conducted an analysis of UHF network affiliates with their VHF counterparts in those markets in which at least one network had a UHF affiliate. NERA concluded that household shares for UHF stations are routinely much lower than those for VHF stations.[43]

Further support for permitting UHF combinations can be found in a NERA study accompanying the comments submitted by the Local Television Station Operators Coalition. That study documented the significant audience share disadvantages of UHF stations, both network and independent, when compared to their VHF counterparts.[44]

Additional evidence for the UHF disparity was contained in comments submitted by the Tribune Company. Tribune's analysis compares the total day audience shares of stations in Boston and Philadelphia. The analysis conclusively shows that the audience share of UHF stations in these markets are significantly lower than the shares of their VHF

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[42]Comments of Malrite Communications Corporation at 17.

[43]National Economic Research Associates, Inc, An Economic Analysis of the Relevant Advertising Markets at 17, Appendices L, M, and N.

[44]NERA, Regulating Television Station Acquisitions: An economic Assessment of the Duopoly Rule at Attachment I and J. filed with Comments of the Local Television Station Ownership coalition, May 17, 1995.

competitors.[45] Similarly, Tribune conducted a study of audience ratings and share analysis, associated with the shift of CBS affiliations from VHF to UHF facilities in Atlanta, Detroit and Milwaukee. Prime time ratings and share declined 35% in Atlanta, 40% in Detroit and 50% in Milwaukee.[46]

In the Prime Time Access Rule proceeding, the Law and Economics Consulting Group, Inc. (LECG), conducted a cross sectional analysis of Fox affiliated stations in 75 markets, comparing average ratings between UHF and VHF stations.[47] Looking at two specific half-hour time periods, LECG found a statistically significant ratings disadvantage associated with being a UHF station.

Also in that proceeding;, INTV submitted evidence documenting the UHF versus VHF ratings disparity.[48] The analysis examined the ratings in the top 100 markets for all first run, off-network and off-Fox programs broadcast during the access period in 1993. The results corroborate the studies filed in this proceeding. Controlling for identical programming, the ratings for UHF stations were significantly below their VHF counterparts.

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[45]Comments of Tribune Broadcasting Company at 29.

[46]Tribune Comments at 30.

[47]Law and Economic Consulting Group, Inc. Economic Report filed in MM Docket No 94-123 at 41.

[48]INTV comments in MM Docket No. 94-123 Appendix Vol. Exhibit 2.

(37.8 percent for first run programs, 38.7 percent for off-network programs and 29 percent for off-Fox programs.)

The submission by Economists Inc. confirms these findings. Economists Inc. examined the ratings for five markets, New York, Cleveland, Portland, Richmond and Amarillo.[49] Using the ratings data, this study corroborates the rating disparity between UHF and VHF stations.

To provide further evidence of the UHF vs. VHF distinction, consider the impact of the affiliate switches which occurred between 1994 and 1996. As Table 1 indicates, in every instance, switching from a VHF to UHF facility has caused a dramatic decline in rating, regardless of the network involved.

Given the status of UHF stations, and the benefits associated with combinations at the local level, the Commission should by general exception to the duopoly rule permit

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[49]Economists Inc, An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-Ownership Rules, Vol 1 at Appendix C Tables C1-C5, May 17, 1995.

TABLE 1

NETWORK AFFILIATION SWITCHES- THE UHF DISADVANTAGES

MARKET	NETWORK	*BEFORE* Channel	*BEFORE* Rating	*AFTER* Channel	*AFTER* Rating	% DIFFERENCE
Atlanta	CBS	5	22.3	46	9.0	-60%
Austin	CBS	7	30.7	42	15.7	-49%
Birmingham	ABC	6	26.0	33	11.0	-58%
Cleveland	CBS	8	19.7	19	9.3	-53%
Detroit	CBS	2	19.2	62	7.7	-60%
Flint	NBC	5	25.0	25	12.0	-52%
Green Bay	NBC	11	18.7	26	13.0	-30%
Greensboro	ABC	8	18.7	45	9.3	-50%
Kansas City	NBC	4	16.3	41	10.7	-34%
Memphis	ABC	13	15.3	24	8.0	-48%
Milwaukee	CBS	6	21.7	58	6.0	-72%
Mobile	NBC	10	19.0	15	11.0	-42%
New Orleans	ABC	8	12.0	26	8.0	-33%
Phoenix	ABC	3	16.7	15	11.0	-34%
St. Louis	ABC	2	14.7	30	9.0	-39%
Tampa Bay	ABC	10	15.7	28	9.3	-41%

AVERAGE= 47%

****source: Neilsen 1994, 1995 and 1996**

Monday-Sunday 9AM-12Midnight household share

UHF/UHF and UHF/VHF combinations.[50] Indeed, Congress itself recognized the distinction between VHF and UHF combinations in the 1996 Telecommunications Act.

> It is the intention of the conferees that, if the Commission revises the multiple ownership rules, it shall permit VHF-VHF combinations only in compelling circumstances.[51]

There is no question that Congress viewed UHF/VHF and UHF/UHF combinations differently from VHF/VHF combinations. By making this distinction, Congress was expressly recognizing that local market combinations involving UHF facilities deserved unique regulatory treatment.

B. Waiver criteria

As noted above, ALTV believes that UHF/UHF and UHF/VHF combinations should be considered a general exception to the duopoly rule. A specific waiver process would result in unnecessary delay and costs to these station combinations. While ALTV does not

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[50]There may be a question regarding the acquisition of additional stations by the established big four networks. In these instances, it may be possible that a network would purchase two stations in a local market in order to ensure that a new, rival network does not secure an affiliate outlet in that market. The potential for such activity, however, does not justify retaining the duopoly rule for the entire industry. Initially, one would expect the existing networks to acquire new stations in separate markets. The primary goal of network distribution is to gain a national clearance, although it is possible that at some point the networks will seek to acquire two stations in the same market. The Commission could handle this potential problem in two ways. First, it could establish a rule preventing the big four networks from acquiring two stations in the same local market. A second possibility is to enact a case by case review of network acquisitions. If the FCC finds that the network acquisition of two stations in a single market would prevent an emerging network from securing an outlet in that market, then it could deny the transfer application.

[51]Conf. Report at 163.

endorse the waiver approach, we make the following observations regarding some of the criteria proposed in the Second Further Notice.

Failed Station: No doubt the "failed station" situation provides the most compelling reason for permitting local combinations. Without the combination, the community will lose a voice in the market. Unfortunately, by itself, the failed station approach could inject some perverse incentives into the market.

Consider a station owner that is marginally profitable and wants to sell the station. Another station in the local market is willing to purchase the station. Because of the economic efficiencies that can be harnessed, the local station may be willing to pay more for the station than one who is not already located in the market. Under the failed station standard, however, the local purchasing station must wait for the station to declare bankruptcy or go off the air. (The *Second Further Notice* suggests four months.) During this time the community is deprived of the station's service. Quality entertainment programs, public affairs shows and newscasts decline or go off the air entirely. Even if the local station is able to ultimately acquire the distressed station, it must spend significant resources rebuilding the station's audience. From the public's standpoint, the FCC should not wait until stations are on the verge of bankruptcy or going dark before permitting a local market combination.

Vacant and New Channel Allotments: The Commission should automatically permit a local market combination if it brings a new station to the marketplace. In these situations there is no question that the combination is increasing diversity and competition in a local market.

Small Market Share and Minimum Number of Voices: We would urge the FCC to be cautious about adopting a market share approach. To the extent market share is a measure of economic concentration in the marketplace, we believe the antitrust laws, as enforced by the Department of Justice, should govern consideration of this element. There appears to be no reason for the FCC to add an additional layer of regulation on the market share concept. Indeed the elusive nature of a station's ever-changing market share makes this a very complex criterion. The FCC should not create a market share standard that acts as a disincentive to improve program quality, hence market share.

With respect to the minimum number of voices, ALTV notes that the benefits of local market combinations often occur in the smallest markets with relatively few voices. These markets cannot support several independently owned stations. As a result, it is difficult to establish, *a priori*, a specific minimum voice test. ALTV also believes strongly that the minimum voice test should include not only local television stations, but radio, cable, MMDS, DBS, telephone company video platforms, newspapers, magazines, video cassette rentals and any other non-broadcast information source such as the Internet.

Public Interest and Unmet Needs: This proposed criterion raises fundamental regulatory issues which go to the heart of broadcast regulation. For half a century, the FCC has endeavored to extricate itself from direct regulation of broadcast content. One important mechanism in the process has been to enact ownership regulations. The theory was that the government would no longer have to impose its concept of what constitutes diverse programming on a licensee, but instead promote diversity through a diverse ownership structure.

In recent years the FCC appears to have shifted its stance, moving forward with direct content regulation. To the extent the Commission is now focusing on direct content regulation to promote diversity, the need for ownership regulation declines accordingly.

From a first amendment perspective, ALTV is concerned about a Commission policy whereby individual stations negotiate away their first amendment rights to program their stations in return for specific regulatory waivers. Such a policy is extremely dangerous as future Commissions condition ownership waivers for specific licensees on the provision of programming that the government believes the public should see and hear.

There is a very delicate balance here. It is one thing to state that, as the natural byproduct of an ownership waiver, the station will provide better quality programming to its community. Indeed, many FCC waivers are based on this theory. It is quite another thing to *require* stations to provide *specific types* of programming in order to receive the waiver.

In the latter instance, the government is directly influencing the editorial judgement of a broadcast licensee. This sets a very dangerous precedent.

V. Local Marketing Agreements Should Be Truly Grandfathered and Ruled Adopted to Permit New LMA Combinations

Apart from issues pertaining to the duopoly rule, Congress has expressed a strong opinion on LMAs. Under the 1996 Telecommunications Act, the FCC is required to grandfather existing LMAs. Thus, if a station was part of an LMA arrangement on November 4, 1996, the LMA relationship may be maintained.

The Commission seeks to limit the scope of the congressional directive by proposing to grandfather LMAs only for the term of the existing LMA contracts. This is not the type of grandfathering envisioned by Congress. On this point the Conference Committee Report is quite specific:

> Subsection (g) grandfathers LMAs current in existence upon enactment of this legislation and allows LMAs in the future, consistent with the Commission's rules. The conferees note the positive contributions of television LMAs and this subsection assures that this legislation does not deprive the public of the benefits of existing LMAs that were otherwise in compliance with Commission regulations of the date of enactment.[52]

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[52]Conf. Report at 164.

The "grandfathering" proposal contained in the *Second Further Notice* is inconsistent with this congressional directive. By limiting LMAs to the terms of their present contracts, the proposal denies the American public the benefits of LMAs after a certain period of time. As a result, the public will be denied the benefits of those LMAs that were in compliance with the FCC's rules at the time the statute was passed. At the time the statute was enacted, nothing in the FCC rules limited LMAs to the time period established in the initial contract. All local arrangements that existed at the time were in compliance with the FCC's policies. To now limit LMAs the time period of existing contracts retroactively applies a new restriction that is in direct conflict with the intent of Congress.[53] When passing the House version of the bill the House Commerce Committee made this point very clear:

> Nothing in subsection (d) is to be construed to prohibit the *continuation or renewal* of any television local marketing agreement in effect of the date of enactment. The Committee wishes to note the positive contributions of television local marketing agreements and to assure that this legislation does not deprive the public the benefits of existing local marketing agreements that were otherwise in compliance with Commission regulations on the date of enactment of this legislation. The efficiencies gained through these agreements have reaped substantial rewards for both competition and diversity, enabling stations to go on the air which would not otherwise be able to obtain financing, and saving failing stations which would otherwise go dark.[54] (Emphasis supplied).

During debates on the Senate floor Senator Ford noted:

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[53]It is not clear whether existing contracts that have renewal options will be honored under the FCC's proposal. Obviously, if the contract contemplated renewals, those renewals should be honored.

[54]H Rep. No. 104-204, 104th Cong. 1st Sess. (1995)

> In addition to the duopoly rule, I am also pleased to see that this conference report grandfathers local marketing agreements or LMA's. Many local broadcasters have stayed competitive by entering into these LMAs with one another.
>
> Together, a review of the duopoly rule and the grandfathering of LMAs, these provisions will help ensure that consumers *always* have access to free local television programming.(emphasis supplied)[55]

The proposal in the *Second Further Notice* is inapposite to these statements. It ensures that these agreements will terminate in the near future. The proposal simply cannot be reconciled with congressional intent.

Equally inconsistent with congressional intent is the proposal to extinguish existing LMA agreements when there is a sale or transfer. LMA agreements are like any other programming contract. The terms of the programming contracts should determine whether the rights transfer to a new owner. The FCC's proposal is nothing more than an attempt to re-write these agreements by striking out provisions which permit transferability and/or renewal.

The FCC's proposal effectively modifies all LMA contracts and may render them useless. Before a station purchases programming that will be broadcast on another (LMA) station, it must be reasonably sure that the other station will be in a position to actually air the programming. If the other station, however, can terminate the LMA agreement by selling

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[55] 142 CONG. REC. S 687, S 705 (daily February 1, 1996)

the facility to a third party, the station purchasing the programming may decide not to buy the programming in the first place. The problem is compounded by the fact that off-network syndicated programs must be purchased a year or two in advance. By proposing to terminate these agreements at the time of transfer, the FCC may create so much uncertainty regarding the viability of LMAs, that it has jeopardized all existing agreements. Such a result is utterly inconsistent with the concept of grandfathering as envisioned by Congress.

Apart from grandfathering, the 1996 Telecommunications Act clearly intended that the FCC permit future LMA agreements. The Conference Committee Report specifically states that Subsection (g) not only grandfathers LMAs then in existence but "allows LMAs in the *future*, consistent with the Commission's rules". It is inconceivable that the FCC would now propose a set of rules that, in effect, ban future LMA agreements.

The FCC could pursue several avenues to ensure that the congressionally recognized benefits of LMAs continue to be provided to the American people. First, the FCC could relax the duopoly rule to permit by rule UHF/UHF and UHF/VHF combinations in local markets. This would effectively grandfather existing arrangements and also permit new combinations under a clearly defined set of rules.

Second, if the FCC does not relax the duopoly rule in this fashion, then ALTV believes that LMAs should not be considered as an attributable interest. The FCC must remember that in radio, LMAs were considered to be attributable interests only after the duopoly rule was relaxed. If the FCC considers television LMAs to be attributable interests, and fails to relax the duopoly rule, then the result will contravene congressional intent. This result would prevent new LMAs from being formed and also require the divestiture of all existing LMAs. Such a result was not envisioned by Congress when it passed the 1996 Telecommunications Act.

Finally, if the FCC does not relax the duopoly rule, then it should enact LMA policies that permit new LMA agreements to be executed. As a matter of fairness, the standards that existed for LMAs on November 4, 1996 should be applied to new LMAs as well. It is patently unfair, and inconsistent with Congressional intent, to create a new set of LMA standards that effectively foreclose future LMA agreements or place them at a competitive disadvantage to "grandfathered" LMA combinations.

VI. Conclusion

The time has come to provide meaningful relief from the FCC's antiquated duopoly rule. The rule was enacted to address problems confronting the FCC during the early 1960s. Over three decades later, the policy concerns that underpin the rule have changed. Gone are the days when a few over-the-air television stations were the only media voices in the local market. Today's market place is characterized by numerous broadcast and non-broadcast media voices. Competition is fierce. Consumers have limitless viewing and listening options. Advertisers have countless mechanisms for getting their message across to potential customers.

Against this backdrop is a thirty-year-old rule which assumes that diversity and economic competition can only be preserved by limiting broadcasters to one television station per market. Precisely the opposite is true. Broadcasters simply cannot survive in a multi-channel world if they are limited to one over-the-air channel. It is ironic that other subscription based over-the-air systems (MMDS & DBS) can control multiple channels in each locality while the only free service is limited to one channel per market.

ALTV believes the time has come to permit commonly owned UHF/UHF or UHF/VHF stations in local markets. Local market combinations involving UHF facilities provide no threat to either diversity or competition. UHF stations are unique and do not generally occupy dominant positions in local media markets. To the contrary, these combinations will improve the quality of the free, over-the-air television service. Program and viewpoint diversity will be enhanced and advertisers will have more competitive voices.

To the extent the FCC decides to keep the duopoly rule, UHF/UHF and UHF/VHF combinations should be permitted as an exception to the rule. There is no need to adopt a costly waiver process that will only drain precious station resources.

When Congress enacted the 1996 Telecommunications Act, it specifically grandfathered existing local marketing agreements. It did so because of the significant public interest benefits LMAs provide in local markets. The record is replete with evidence demonstrating that these arrangements increase service to the public. A sound LMA policy will become more important if the FCC fails to provide the meaningful duopoly relief mentioned above.

ALTV opposes the FCC's proposal to grandfather existing LMAs only for the term of existing contracts. Moreover, we disagree with the FCC that these contracts should terminate when a station is sold or transferred. Make no mistake, these proposals are the antithesis of grandfathering and jeopardize existing LMA agreements. In addition, Congress specifically called for a policy that would permit future LMAs as well. The FCC should enact LMA policies that facilitate the creation of new arrangements on terms and conditions similar to those that receive grandfathered status.

ASSOCIATION OF
LOCAL TELEVISION STATIONS

Respectfully submitted,

David L. Donovan,
Vice President Legal and Legislative Affairs
1320 19th Street, NW
Suite 300
Washington, DC 20036
(202) 887-1970

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